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IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

No. 1083

FINLEY McADOO PAINTER,
Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on March 11, 1963.

OPINIONS BELOW

The judgment of the United States District Court for the Southern District of West Virginia is reproduced in the Appendix B to this petition as well as the opinion of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the District Court, which is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1963, affirming the judgment of the United

States District Court for the Southern District of West Virginia. This court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Whether the Government sustained the burden of proving beyond a reasonable doubt that the Petitioner devised a scheme to defraud under U.S.C., Title 18, Section 1341-1343.

1. Whether or not a Defendant who follows his attorney's advice explicitly, and the attorney so testifies that he did, whether this is a defense in a criminal action for fraud (a question which has not yet been decided by this court);

2. Whether the words "fully secured by twelve month corporate notes", when in fact the corporate notes were so issued as per advertising, constitutes fraud or a debtor-creditor relationship;

3. Whether a Defendant who has followed explicitly the advice of his attorney, and the attorney so testifies that he did, the Defendant is entitled to a charge by the trial court that such legal advice may negative the intent of the Defendant to commit a crime.

STATUTES INVOLVED

The statutory provisions involved are Title 18, Sections 1341-1343 of the United States Code. They are printed in Appendix A hereto.

STATEMENT OF CASE

The Defendant-Petitioner was the chief stockholder in three West Virginia corporations i.e. State Motor Sales, Credit Discount Corporation and Credit Realty Corpora-

tion. State Motor Sales was organized September 31, 1952, the purpose of which was to buy and sale used automobiles. Credit Discount Corporation was organized October 18, 1959, for the purpose of discounting notes. On February 17, 1960, Credit Realty Corporation was organized for the purpose of developing and selling certain real estate known as the "Peck farm" adjacent to the City of Huntington, West Virginia.

The Petitioner retained an attorney by the name of Mr. Kellum D. Pauley of Charleston, West Virginia, to advise him how to acquire unimproved property, to improve the same, to sell it and to take second mortgages on the improved property for the purpose of making it easy for prospective purchasers to purchase the improved property. It was Mr. Pauley's suggestion that two corporations be formed, Credit Discount Corporation and Credit Realty Corporation. The Credit Realty Corporation was to take title to the unimproved property and was then to improve the same and sell to prospective purchasers. The purpose of Credit Discount Corporation being to take second mortgages from Credit Realty Corporation and to discount paper. Credit Discount Corporation was first organized, and the unimproved property, know as the Peck farm, was negotiated for by the Petitioner and as yet Credit Realty Corporation had not been chartered. Since Credit Realty Corporation had not yet been chartered, it was the attorney's advice that title be taken to the property in the name of State Motor Sales, and after the Credit Realty Corporation had been chartered that the title to the property would be transferred to the Credit Realty Corporation, which was subsequently done. Mr. Pauley testified in the lower court to the above facts and further testified that to set up these two corporations as above outlined would be a tax saving to the Petitioner of approximately 800%. Mr. Pauley then advised, and he so testified, the Petitioner as to certain advertising, which was placed with two radio stations, a television station, in a newspaper and in the mails, a sample of which is as follows (Govern-

ment's Exhibit No. 25). "Monthly income for you. We suggest you come to our office to investigate this opportunity now. We offer you an income. We pay you interest monthly. *Secured by corporate notes.* We will pay 12% interest for one year loans. Due to the increase in volume and expansion of business we are able to offer 12%. This offer good only for the month of December, 1959. Interest retroactive to the 1st if accepted by the 15th".

In response to the sample of above described advertising, investors invested the total sum of $24,000.00, and in each instance a corporate note of the Credit Discount Corporation was given to each individual investor and interest was in fact paid to each investor as promised until the Petitioner had financial difficulty with a local banking institution called the Guaranty National Bank of Huntington, West Virginia, which Bank filed a lis pendens against the Petitioner individually and against all of the assets of these three corporations, which lis pendens froze all of the assets of Credit Discount Corporation, and said Corporation was no longer able to pay the amounts of interest as advertised. After the suit was filed by the Guaranty National Bank, on the advice of Mr. Pauley, title to the Peck farm was shifted back and forth between State Motor Sales and Credit Realty Corporation in order to force the Guaranty National Bank to come to an agreement with the Petitioner individually. Mr. Pauley testified also as to this. Subsequently the Petitioner was indicted, tried and convicted on five counts under U.S.C., Title 18, Sections 1341-1343, devising a scheme to defraud through the newspapers, in interstate commerce, radio, television and through the mails on May 4, 1962. He received a total sentence of sixty-eight months and fined $5,000.00. The Petitioner is presently serving his sentence in The Federal Correctional Institution at Lewisburg, Pennsylvania.

An appeal was subsequently taken on May 14, 1962, and on March 11, 1963, the Fourth Circuit Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which has not been determined by this Court and should be determined by this Court. That question being when a person seeks legal advice and follows such legal advice explicitly, and after all of the facts have been disclosed to his attorney and the said attorney so testifies in the trial court, such advice should constitute a defense to a criminal charge. The case of *Miller v. U. S. 277 Fed. 721 (4th Cir. 1921)* is the leading case upon which the Fourth Circuit Court of Appeals bases its contention, upon the fact that this is no defense. However, this case involved the unconstitutionality of an act in which the attorney advised his client as to such unconstitutionality, and the court held that this was not a defense upon the theory that ignorance of the law is no excuse. In the instant case the attorney did not advise the Petitioner as to the law, he advised him as to the facts, and in this I contend there is a great difference between the instant case and the Miller case. In other words, in the instant case the criminal intent of the defendant was lacking. "Criminal intention is of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality. This rule is based on another rule of the common law, of very general application, to the effect that there can be no crime when the criminal mind or intent is wanting." *Am. Jur. Vol. 15, P. 9, Sec. 306.*

2. If following an attorney's advice explicitly does not constitute an absolute defense, then it should be a question for the jury to determine as to whether or not the defendant possessed the criminal intent to commit such a crime, and they should have been so charged by the trial court.

3. When advertising in interstate commerce contains the words "secured by corporate notes", and corporate notes were in fact issued to lenders, this establishes

nothing more than a debtor-creditor relationship, and, therefore, could not possibly constitute a crime; this coupled with the fact that the defendant paid the interest as advertised would negative any criminal intent.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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Attorney for Petitioner

APPENDIX A

A — STATUTES

Title 18, U.S.C., Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, U. S. C., Section 1343.

Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX B

JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF W. VA.

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v.
FINLEY McADOO PAINTER
No. 8861, Upon an Ind. for vio. T. 18,
Secs. 1341 and 1343, U.S.C.

At Huntington, in said District, on the 4th day of May, 1962, came the United States Attorney as well as the defendant, Finley McAdoo Painter, in person and by Keith L. Newman, his counsel, in answer to the verdict of "Guilty" as to Counts Nos. 1, 2, 3, 4, and 5 of the Indictment herein, previously rendered by the jury on December 6, 1961.

It is adjudged that the defendant, Finley McAdoo Painter, has been convicted upon the verdict of a jury finding the defendant, Finley McAdoo Painter "Guilty" as to Counts Nos. 1, 2, 3, 4, and 5 of the Indictment herein, charging violation of Title 18, Sections 1341 and 1343, U. S. Code, as charged in said counts of said Indictment;

And the court having asked the defendant, Finley McAdoo Painter, whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

IT IS ADJUDGED that the defendant, Finley McAdoo Painter, is guilty as charged and convicted.

IT IS ADJUDGED that the said defendant, Finley McAdoo Painter, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on Count 1 of the Indictment herein, and it is ordered that he pay a fine of One Thousand Dollars ($1,000.00) on Count 1; that the said defendant, Finley McAdoo Painter, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY TWO (32) MONTHS on Count 2 of the Indictment herein, and it is ordered that he pay a fine of One Thousand Dollars ($1,000.00) on Count 2, the sentence on Count 2 to run consecutively with the sentence imposed on Count 1; that the said defendant, Finley McAdoo Painter, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY TWO (32) MONTHS on Count 3 of the Indictment herein, and it is ordered that he pay a fine of One Thousand Dollars ($1,000.00) on Count 3, the sentence on Count 3 to run concurrently with the sentence imposed on Count 2; that the said defendant, Finley McAdoo Painter, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on Count 4 of the Indictment herein, and it is ordered that he pay a fine of One Thousand Dollars ($1,000.00) on Count 4, the sentence on Count 4 to run concurrently with the sentence imposed on Count 1; that the said defendant, Finley McAdoo Painter, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY TWO (32) MONTHS on Count 5 of the Indictment herein, and it is ordered that he pay a fine of One Thousand Dollars ($1,000.00) on Count 5, the sentence on Count 5 to run concurrently with the sentence imposed on Count 2, making a total sentence of SIXTY EIGHT

(68) MONTHS, said sentences to begin to run as of this date, and making a total fine of Five Thousand Dollars ($5,000.00).

In imposing this sentence the court has taken into consideration the four (4) months that the defendant, Finley McAdoo Painter, has been in custody, and no further credit will be extended for the time spent in jail.

IT IS FURTHER ORDERED that the defendant, Finley McAdoo Painter, stand committed until the fines are paid or that the said defendant is otherwise released by law; that no costs be recovered from said defendant, and the said Finley McAdoo Painter is remanded to the custody of the Marshall of this court.

The court recommends commitment of said defendant to the United States Penitentiary at Lewisburg, Pennsylvania.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

HARRY E. WATKINS,
United States District Judge.

APPENDIX C

OPINION OF THE
FOURTH CIRCUIT COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8680.

United States of America,
Appellee,

versus

Finley McAdoo Painter,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT HUNTINGTON. HARRY E. WATKINS, DISTRICT JUDGE.

(Reargued January 10, 1963. Decided March 11, 1963.)

Before SOBELOFF, Chief Judge, BRYAN, Circuit Judge, and LEWIS, District Judge.

Keith L. Newman for Appellant, and George D. Beter, Assistant United States Attorney, (Harry G. Camper, Jr., United States Attorney, on brief) for Appellee.

SOBELOFF, Chief Judge:

After a trial extending over six days a jury in the United States District Court for the Southern District of West Virginia found Finley McAdoo Painter guilty on a five-count indictment charging use of the mails, and of radio and television in interstate commerce, with intent to defraud. 18 U.S.C.A. §§ 1341, 1343. The main contention made on this appeal is that the evidence was not sufficient to warrant the jury's finding that he had devised a scheme to defraud, and that therefore the District Court should have directed a judgment of acquittal in accordance with the defendant's motion. Our reading of the record compels us to hold that the conviction must stand.

A recital of the proof adduced by the Government necessarily begins with October 9, 1959, when Painter launched an extensive advertising campaign to encourage the general public to invest in a real estate project. Nine days later he organized and became sole owner of a company chartered as the Credit Discount Corporation. Prospective investors were told that Credit Discount owned a valuable 140-acre parcel of land known as the Peck Farm, situated adjacent to Huntington, West Virginia, and that this property was to be subdivided, developed, and improved by housing construction. It was represented that the company would pay eight to twelve per cent interest on all loans of $1000 or more "plus the return of entire principal in 12 months" and that such investments would be "fully secured by 12-month corporate notes." The advertisements further proclaimed that Credit Discount held "numerous properties over the city" and that it "had more than double the amount of assets to take care of these notes."

For more than a year Painter persisted in relaying to the public by mail, radio, television, and personal interview his promises of quick profits. That success of the promotional campaign depended upon interstate communications is

undisputed.[1] The messages apparently bore fruit, for it is conceded that about a dozen persons relied thereon and invested a total of $24,000. And yet it is a striking fact that Credit Discount never took title to the Peck Farm or refunded, with but one exception,[2] any portion of the principal sum to the investors.

The record discloses that the Peck Farm was not acquired until December 14, 1959, when it was conveyed for the first time not to Credit Discount, but to State Motor Sales, Inc., another company also controlled by Painter as sole shareholder. On February 17, 1960, he and his wife incorporated a third entity and named it the Credit Realty Corporation. Shortly thereafter State Motor Sales transferred the Peck Farm to the new company. After holding this property for less than four months, Credit Realty reconveyed it to State Motor Sales on July 18. Later still, the Peck Farm was transferred back to Credit Realty, but not once did it pass to Credit Discount, which purportedly held the real estate as security for the "fully secured" corporate notes issued to investors. The debtor, Credit Discount, remained wholly without assets during the entire period, except for a brief interlude when it was in possession of two other properties of relatively inconsequential value.[3]

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[1] Thus there is no problem here involving the role of the United States mails (or other means of interstate communication) in executing the scheme to defraud, as was the case in *Kann* v. *United States*, 323 U.S., 88 (1944); *Pereira* v. *United States*, 347 U.S. 1 (1953); or *Parr* v. *United States*, 363 U.S. 370 (1960).

[2] Only Mrs. Gertrude L. Walcutt, who recovered half of her original investment of $2000, was spared total loss.

[3] The evidence reveals that the two other properties which Painter claims were used to secure the Credit Discount notes consisted of a vacant theater building and an unimproved city lot, previously owned by State Motor Sales. Both were non-income producing properties and had been listed for sale by State Motor Sales prior to their conveyance to Credit Discount in February, 1960, and October, 1959, respectively. They were both reconveyed to State Motor Sales in July, 1960.

As the Peck Farm, the very keystone of the financial structure, shuttled back and forth between interlocking corporations at his personal whim, Painter continued to assure his investors that it was Credit Discount's primary asset. The confusion created by the deceptive similarity of the two corporate names, Credit Discount and Credit Realty, was compounded by joining both corporations in the same advertising. According to Philip R. Reeder, office manager for Credit Discount, this strategy was intended to cause the public to associate the corporations as one, rather than to distinguish between them as separate entities.[4]

Meanwhile, barren of assets and thus insulated from potential claims of its creditors, Credit Discount was being steadily drained by Painter of its investment funds as they were received. This callous abuse of his position of trust was nowhere better portrayed than in Reeder's testimony. He swore that Painter instructed him to divert the Credit Discount money into the bank account of State Motor Sales, then in serious financial difficulty. He testified explicitly that Painter avowed to him that the purpose of these transfers was to make certain that these funds would be beyond the reach of the investors when their notes matured. Checks were drawn on Credit Discount's account to cover overdrafts of State Motor Sales to purchase a pair of airplanes, to make political contributions, and for other uses known only to Painter and unrelated to the purpose for which persons had been led to advance their money. Whether they were technically "investors" or, as they were sometimes called, "lenders," is immaterial. Additional witnesses substantially corroborated Reeder and certified copies of cancelled checks were introduced as government exhibits. While the Government was unable at

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[4] It may be noted parenthetically that one of Painter's own witnesses, C. F. Fuller, who had been engaged to survey the Peck Farm, could not accurately state which company paid for his services. He also testified that he thought both companies were one and the same.

trial to trace each and every defalcation,[5] there is significance in Painter's inability to offer to his investors any explanation of the ultimate disposition of their money when his financial empire finally collapsed in December, 1960. Judgment was entered against the now insolvent State Motor Sales in the sum of $71,000 on a lis pendens earlier filed by a creditor bank, thereby choking off what remained of the investment funds and freezing all assets, including the Peck Farm. Needless to say, Credit Discount was without funds to satisfy its investors' claims. The Peck Farm remained undeveloped.

In the circumstances here disclosed, we cannot escape the conclusion that there was "substantial evidence which, taken in the light most favorable to the United States, tends to show that the defendant is guilty beyond a reasonable doubt." *Bell* v. *United States*, 185 F. 2d 302, 310 (4th Cir. 1950).[6] From a series of transactions the court preliminarily, and later the jury, could properly infer that Painter had devised a scheme for a major campaign of deceit through the mails, radio, and television to obtain funds on the strength of false assurances as to Credit Discount's financial strength, and then to divert the proceeds to his personal use. The deliberately false statements and subsequent conversion of funds by one who had assumed a

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[5] Conversion of money to the defendant's private use was not an essential element to be proved by the Government, *United States* v. *Bagdasian*, 291 F.2d 163, 164 (4th Cir. 1961), although evidence of such misappropriation is clearly relevant and admissible. *United States* v. *Crosby*, 294 F.2d 928, 947 (2d Cir. 1961).

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[6] See also *United States* v. *Stradley*, 295 F.2d 33, 35. (4th Cir. 1961); *United States* v. *Freeman*, 286 F.2d 262, 266 (4th Cir. 1961); *United States* v. *Baren*, 305 F.2d 527, 533 (2d Cir. 1962); *Henderson* v. *United States*, 202 F.2d 400, 403 (6th Cir. 1953).

fiduciary position constituted a patent fraud on the investors whom he had solicited.[7]

Painter argues that he did exactly as promised, making interest payments on the loans until the filing of lis pendens interrupted his plan to go through with the real estate project. The suggestion apparently is that the defendant actually believed that the enterprise would ultimately show a profit and that if he had been permitted to go on he would have performed his promises to repay the principal in full within twelve months. The clear answer is that no amount of honest belief that his corporate enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds were obtained.[8] An investor may be defrauded if his reliance is induced by deliberately false statements of fact, and the defendant's optimism as to the future is no defense.[9] Moreover, the scheme to defraud may consist of suggestions and promises as to the

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[7] *Bradford* v. *United States*, 129 F.2d 274, 276 (5th Cir. 1942); *United States* v. *Buckner*, 108 F.2d 921, 926 (2d Cir. 1940); *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla. 1962); *cf. Aiken* v. *United States*, 108 F.2d 182, 184 (4th Cir. 1939). Sending false financial statements through the mails (or in interstate commerce) in order to secure credit, knowing that such statements are false, constitutes a violation of the statutory provisions here involved. *Dranow* v. *United States*, 307 F.2d 545 (8th Cir. 1962); *Danser* v. *United States*, 281 F.2d 492 (5th Cir. 1960); *Henderson* v. *United States*, *supra*; *Bobbroff* v. *United States*, 202 F.2d 389 (9th Cir. 1953); *Slakoff* v. *United States*, 8 F.2d 9 (3rd Cir. 1925); *United States* v. *Epstein*, 152 F. Supp. 583 (E.D. Pa. 1957).

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[8] *Greenhill* v. *United States*, 298 F.2d 405, 411 (5th Cir. 1962); *United States* v. *Farago*, 283 F.2d 772 (2d Cir. 1960); *Frank* v. *United States*, 220 F.2d 559, 564 (10th Cir. 1955); *Deaver* v. *United States*, 155 F.2d 740, 744 (D.C. Cir. 1946); *Hawley* v. *United States*, 133 F.2d 966, 970 (10th Cir. 1943); *Foshay* v. *United States*, 68 F.2d 205, 210 (8th Cir. 1934); *Pandolfo* v. *United States*, 286 Fed 8, 13 (7th Cir. 1923). See also *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 283 (1942) dissenting opinion).

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[9] *Getchell* v. *United States*, 282 F.2d 681, 688 (2d Cir. 1961); *Baker* v. *United States*, 115 F.2d 533, 539 (8th Cir. 1940); *Linn* v. *United States*, 234 Fed. 543, 552 (7th Cir. 1917).

future, not made in good faith but with deceptive intent.[10] The testimony here was such that either or both forms of fraud could be found.

While some of the investors did testify that they received regular interest payments, this does not necessarily establish the defendant's good faith, for in this setting it was consistent with an attempt to perpetuate the false appearance of things (in respect to the stability of the company and the "fully secured" notes), and to conceal the fraud already effected, and also to ensnare others. Only recently the Supreme Court had occasion to point out that communications having a propensity to lull and forestall action on the part of the victims may form an integral part of the overall scheme to defraud. *United States* v. *Sampson*, 371 U.S. 75, 80 (1962).[11]

The final point raised by the appellant requires only brief exploration. He claims that he was guided in part by legal counsel. On this record we cannot accord finality to his answer that in pursuing the actions under inquiry he had obtained a legal opinion. In judging whether the defendant's behavior was honest or corrupt, this is a circumstance the jury was entitled to weigh and consider as part of the entire context of the case. If in good faith reliance upon legal advice given him by a lawyer to whom he has made full disclosure of the facts, one engages in a course of conduct later found to be illegal, the trier of fact may in appropriate circumstances conclude that the conduct was innocent because "the guilty mind" was absent. See *United States* v. *Phillips*, 217 F.2d 435, 441-43 (7th Cir. 1955);

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[10] *Durland* v. *United States*, 161 U.S. 306, 313 (1896); *United States* v. *Comyns*, 248 U.S. 349, 353 (1919).

[11] See also *Cacy* v. *United States*, 298 F.2d 227, 230 (9th Cir. 1961); *United States* v. *Fromen*, 265 F.2d 702, 704 (2d Cir. 1959); *Wiltsey* v. *United States*, 222 F.2d 600, 602 (4th Cir. 1955); *Clark* v. *United States*, 208 F.2d 840, 841 (D.C. Cir. 1953).

Miller v. *United States*, 277 Fed. 721, 726 (4th Cir. 1921). But consultation with a lawyer confers no automatic immunity from the legal consequences of conscious fraud. *United States* v. *Shaefer*, 299 F.2d 625, 639 (7th Cir. 1962); *Linden v. United States*, 254 F.2d 560, 568 (4th Cir. 1958).

The crucial question here is the defendant's state of mind in issuing the interstate communications. The question being one for the jury and having been appropriately submitted, the conviction stands upon solid ground.

Affirmed.

Office-Supreme Court, U.S.
FILED
JUL 16 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1083

FINLEY McADOO PAINTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 314 F. 2d 939.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1963. On April 4, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 10, 1963 and the petition was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to have the jury consider his defense of having acted upon the advice of counsel.

2. Whether the evidence supports the verdict.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on a five-count indictment charging the use of mail, radio, and television in execution of a scheme to defraud (18 U.S.C. 1341, 1343). Petitioner was sentenced to sixty-eight months imprisonment and a fine of $5000. The conviction was affirmed on appeal.

1. The scheme charged involved false representations as to the assets of Credit Discount Corporation, a corporation controlled by petitioner, for which he was soliciting investments through radio, television, and newspaper advertising. The advertising promised interest at rates of 8 and 12 percent on investments "secured" by corporate notes or "corporate note and collateral" (Tr. 34–36, 65–70).[1] In response to the advertising, a number of prospective investors came to the office of the corporation and were told of various assets purportedly owned by the corporation. These representations were made by petitioner's office manager, by petitioner's brother, and in one instance by petitioner himself (Tr. 117).

Four investors were told that the corporation owned property known as the "Peck Farm" which the corporation was going to develop as a real estate project

[1] "Tr." refers to the two volume transcript of the trial in the District Court, which we have lodged with the Clerk of this Court.

(Tr. 101, 106, 117, 129).[2] In fact no part of the Peck Farm was ever conveyed to Credit Discount and it was never petitioner's intention that this corporation would own the farm (Tr. 429–430, 433, 610–611, 628, 639, 644). The farm did come under the ownership of other corporations controlled by petitioner (Tr. 393, 373, 668, 618, 429) and was ultimately conveyed to a sister-in-law of petitioner, who held title as of the date of trial (Tr. 489, 700). The office manager of Credit Discount—who was also indicted and had pleaded guilty—testified that he had been instructed by petitioner to tell investors that Credit Discount owned the farm (Tr. 282). Petitioner told the manager that, since title to the farm was actually in Credit Realty, another corporation controlled by petitioner, the Credit Discount investors could not reach this asset (Tr. 284). The manager explained that the similarity in names between Credit Discount and Credit Realty was deliberate so that investors would believe that the two corporations were the same and that the assets of Realty were those of Discount (Tr. 282–283).

Three investors testified that, when they went to the office of Credit Discount in December 1959, they were told that the corporation owned a theater (Tr. 106, 129, 137). On February 9, 1960, the corporation acquired a theater property which had been damaged by fire and had not been operated as a theater for several years (Tr. 369–370; 685–686). Prospective

[2] A fifth investor-victim testified to representations of ownership of "Kyle Field" (Tr. 137) which appears to be another name for the Peck Farm (Tr. 129).

investors were also told that the corporation was in the business of discounting automobile paper (Tr. 90, 106, 130–131). In fact, the corporation never engaged in the discounting of any automobile paper (Tr. 595–596).

In total, the investors contributed an aggregate of $24,000 to petitioner's corporation (Tr. 736–739). Although the corporation did pay interest from time to time, totalling $1,978.40 (Tr. 739), only one investor ever received even a partial repayment of principal (Tr. 79, 86, 92, 95, 103, 110, 120, 131, 136, 142, 149, 737–738).

2. Pauley, an attorney who had represented petitioner in the incorporation of both Credit Discount and Credit Realty (385–391), was called by the defense. In connection with Credit Discount's solicitations, he had examined some "memoranda pertaining to advertising" and suggested certain deletions which he believed were made (Tr. 388). Pauley's testimony did not indicate that he was ever consulted with respect to the more specific and personal misrepresentations involved in this case.

ARGUMENT

1. Reliance upon the advice of counsel is relevant as a defense only where a specific intent to violate the law on which counsel has rendered advice is a necessary element of the crime. Here, even if petitioner had relied upon the advice of his counsel that his conduct was not in violation of any federal statute, this would no more constitute a defense than would ignorance of the law. Petitioner intended to deceive

investors by representations which he knew to be untrue. This was the only element of *mens rea* necessary for violation of the federal mail and "wire" fraud statutes; a specific intent to violate these federal statutes is not an additional element of the crime.

Moreover, there is no evidence that petitioner's counsel advised him with regard to the crucial misrepresentations in the present case. Neither petitioner nor Pauley, the attorney, ever testified to any consultations or advice regarding the misrepresentations as to the ownership of particular assets which induced the investors to part with their money.

In any event, petitioner's present contention that the trial court should have incorporated a specific instruction on the effect of reliance on the advice of counsel comes too late. The judge fully instructed on the question of fraudulent intent and good faith (Tr. 823–824) and, following the instructions, petitioner's trial counsel stated: "Your Honor, the defendant has no exception; we think he has covered the law and was very fair" (Tr. 834). Accordingly, petitioner cannot now complain that the instruction should have been more detailed. Rule 30, F.R. Crim. P.

2. Petitioner contends that the evidence to support his conviction was insufficient because his advertising, stating that the investment would be "secured by corporate notes," was truthful since corporate notes were given (Pet. 5–6). This argument ignores the advertising which referred to additional collateral (Tr. 35). In fact there was virtually no collateral. Moreover, the phrase—"secured by corporate notes"—

would suggest to an ordinary reader that there was far more in the way of security than the bare issuance of notes by a corporate shell.

Finally, even if all the advertising were innocent on its face, the advertising was utilized as a step in the execution of a scheme to defraud. It functioned as bait to lure the victims to the office where a number of misrepresentations were made. Hence the alleged innocuous nature of the advertising is no defense to the charge of using interstate communication facilities in execution of a scheme to defraud. As this Court said in *Badders* v. *United States*, 240 U.S. 391, 394, involving a mail fraud prosecution, "Intent may make an otherwise innocent act criminal, if it is a step in a plot." See also *Durland* v. *United States*, 161 U.S. 306, 315. Accordingly the courts have held that the relative innocence of mailed matter is immaterial where the mailing is a functional part of the scheme to defraud. *Holmes* v. *United States*, 134 F. 2d 125, 134 (C.A. 8), certiorari denied, 319 U.S. 776; *Stephens* v. *United States*, 41 F. 2d 440 (C.A. 9), certiorari denied, 282 U.S. 880; *United States* v. *Schaefer*, 299 F. 2d 625, 629, certiorari denied, 370 U.S. 917.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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